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No. 555

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

C. GEORGE SWALLOW,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No.....

C. GEORGE SWALLOW,

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and to the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on July 11, 1962, affirming judgment entered by the United States District Court for the District of Colorado after verdict of a jury finding that petitioner was guilty of violating Title 26, Sections 145(b) asd 7201 of the United States Code.

REPORT OF OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is not as yet reported in official or unofficial reports. A copy of the opinion is set forth in Appendix A, *infra*, pp. 41-48.

JURISDICTION

The judgment of the Court of Appeals is dated July 11, 1962, and was entered July 11, 1962, copy of which is set forth is Appendix B, *infra*, p. 49; and, order of the Court of Appeals denying Petition for Rehearing is dated August 28, 1962, was entered September 5, 1962, copy of which is set forth in Appendix C, *infra*, p. 50; and, order of the Court of Appeals dated September 5, 1962, granted petitioner until October 4, 1962, within which to file petition for writ of certiorari; and, order extending time to file petition for writ of certiorari was granted October 1, 1962, by Associate Justice of the Court Byron R. White, granting petitioner to and including October 24, 1962, within which to file petition for writ of certiorari.

The jurisdiction of this Court is invoked under Title 28, Section 1254(1) of the United States Code.

QUESTIONS PRESENTED

I

In an income tax evasion case, whether statements of the petitioner made out of court to witnesses to the effect that the petitioner was "judgment proof", "living out of promotional expenses of a corporation", "did not intend to file tax returns", and "all his money was is his wife's name", are sufficient to establish the necessary corroboration of intent to file deficient and fraudulent tax returns.

II

In an income tax evasion case, whether the testimony and exhibits connected therewith of the prosecution's key witness, a revenue agent, was and were sufficient and competent to establish the element of taxable income, where certain material testimony was admitted to be arbitrary and based upon assumptions of the witness, and to be based

in part upon the testimony of other witnesses in the case, and such expert testimony otherwise contentious, conclusory and confusing.

III

In a criminal trial to a jury, whether the motion and petition of petitioner presented to the trial court after trial and verdict of guilty requesting a supplemental proceeding to determine the merits of the allegations in such motion and petition that a juror gave incorrect and mis-leading answers to questions propounded on *voir dire*, and that the reporter's transcript should be corrected in such respect, was denied, should have been granted, and such denial a violation of petitioner's rights under the Fifth and Sixth Amendments to the Constitution of the United States.

IV

In an income tax evasion case, whether the so-called "lead rule", required to be applied in "net worth" cases under the rule of *Holland v. United States*, 348 U.S. 121, should be applied to a "specific items" case, particularly, where both methods of proof are used by the prosecution, or, the "net worth" method used to bolster the "specific items" method, and the facts of the case make the application of the "lead rule" appropriate and fair.

V

In an income tax evasion case, whether the suppression of evidence favorable to the petitioner and the construction and interpretation of evidence as to taxable income, deductions, and eliminations from income, was strained, contentious and confusing, brought forth by the prosecution's expert witness, on material matters of the case, are a violation of the rights of petitioner under the due process clause of the Fifth Amendment to the Constitution, and under considerations of federal justice.

VI

In an income tax evasion case, whether some legal standard on accounting of, construction of, and interpretation of, specific items of deductions and eliminations from income, as well as of income, is required as a matter of fairness and to minimize uncertainty and confusion in the presentation of such matters to a jury, in the predication of taxable income as an element of the offense charged, where the key witness for the prosecution is both a factual witness and the expert witness presenting such evidence.

VII

In an income tax evasion case, where the testimony of independent accountants called as witnesses and who prepared the tax returns in question is uncontroverted on all but one item of income in one of two tax years in question, to the effect and import that the omissions of gross income and receipts, as well as some of deductions and eliminations from income, was due to their negligence and oversight, not induced by the petitioner, coupled with his uncontroverted testimony of reliance upon such accountants in good faith, whether such evidence favorable to the defense is controlling, as to the element of intent.

VIII

In an income tax evasion case, whether the introduction into evidence by the prosecution of statements in a letter written by the petitioner five years after the last indictment year to the effect that petitioner offered to execute an affidavit in favor of a third party who was his creditor, whereby such creditor could justify a tax loss, and the petitioner offering to make arrangements on the principal of the debt privately with such creditor, but no proof was ever shown that such offer was carried out, or even attempted, was prejudicial and deprived the petitioner of a

fair trial, even though not objected to at the trial, due to the practical relation and importance of such evidence to the case for the prosecution and considerations of federal justice.

IX

Whether petitioner's motion for judgment of acquittal, presented at the close of the case for the prosecution, and re-newed at the close of all evidence in the case, and re-entered after the verdict of guilty, should have been granted by the trial court.

X

In a tax evasion case, whether the uncontroverted defenses of the petitioner, brought out for the most part through his own testimony, and in part corroborated by other witnesses and evidence in the case, as to expenses, deductions and eliminations from taxable income, and when unchecked or not investigated, or no reasonable basis shown therefor, by the prosecution, even as late as the time of and during trial, are to be considered as controlling.

XI

In an income tax evasion case, whether schedules and exhibits of computations of the expert witness for the prosecution, running to proof of and calculation of the taxable income of the petitioner, offered as visual portrayal of the testimony of such expert witness, are properly allowed to be taken into the jury room as other tangible or exhibit evidence in the case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment V to the Constitution of the United States reads in part as follows:

"No person . . . nor be deprived of life, liberty or property, without due process of law . . .".

Amendment VI to the Constitution of the United States reads in part as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .".

Title 26 Section 145(b) of the United States Code provides as follows:

"Any person required under this chapter to collect, account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Title 26 Section 7201 of the United States Code provides as follows:

"Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

STATEMENT

Petitioner was indicted on two counts, the first being a violation of 26 U.S.C. 145(b) pertaining to the tax year 1953, and the second being a violation of 26 U.S.C. 7201, pertaining to the tax year 1954. The 1953 count charged in substance that petitioner reported in a joint tax return with his wife net income of $4,551.57 and tax due and owing thereon of $344.45, whereas their joint net income was $15,031.19, and the tax owing thereon was $3,042.60. The 1954 count charged in substance that petitioner reported in a joint tax return adjusted gross income of $1,650 and tax due and owing thereon was none, whereas their joint taxable income was $12,652.78, and the tax owing thereon was $2,915.82. (R. 2-3.)[1]

In 1953 petitioner and one Hershfield became organizers, officers and directors of a newly formed corporation, Industrial Gas Company, (R. 58-59.) and it was agreed that each was to draw a salary of $1,000 per month. (R. 58, 68.) This salary was paid once in 1954 to petitioner in amount of $1,000, was deposited in his wife's bank account, was charged on Industrial's records as back salary, and was unreported on the 1954 tax return of petitioner. (R. 223, 302, 409, Ex. 112.) Industrial commenced business operations and derived income from shipments of natural gas for about 2 years to customers in South Dakota. (R. 339, 341.) A bank account in Salt Lake City was set up as depository of the funds of Industrial, and petitioner and Hershfield authorized to jointly draw corporate checks. (R. 59.) Petitioner lived in Chicago up to that time and decided to move West when Industrial came into being, and he decided to settle in Denver, moving his family there in early 1953. (R. 60, 335, 337.) Hershfield approved that

[1] Record references are to the "Transcript of Record", printed for use in the Court of Appeals, submitted herewith. The certified record has been lodged with the Clerk.

Industrial would pay the moving expenses and some personal living expenses of petitioner, (R. 61-63, 68.) and corporate checks were used to pay directly $152[2] for repairs to petitioner's auto, $375 for house rental, and $145 for rugs and beds, a total of $672. (R. 46-50, 78-79, 91-92, 95, 297-298.) These items were unreported on the 1953 tax return of petitioner. (R. 285, 297-298.)

Hershfield resigned from Industrial in the middle part of 1953, (R. 64, 373.) and thereafter petitioner set up first one and then another corporate bank account at Denver and exercised sole authority to sign corporate checks. (R. 25, 373.) In 1954 personal expenses of petitioner paid directly by Industrial checks comprised $345 to a man's clothing store, which was unreported on the 1954 tax return of petitioner. (R. 147, 304-305, Ex. 115.)

Industrial operated at a profit for only about a month, and operated at a loss during an 18 month period in 1953 and 1954, which situation compelled petitioner to borrow money to keep Industrial in operation. (R. 261, 341-342.)

Petitioner commenced depositing substantial sums into Denver bank accounts held in his wife's name by direct transfer from Industrial bank accounts, and $6,403 was so transferred in 1953, and $11,018 so transferred in 1954. (R. 299-300, 303, Ex's. 111, 113.) Part of these transfers were designated as corporate expenses, e.g., promotion, travel, telephone, etc., on Industrial check stubs, with the knowledge and approval of the certified public accountants who handled the accounting for Industrial, and who made two complete audits of Industrial's books, and who prepared petitioner's 1953 and 1954 tax returns. (R. 229-231, 235, 242, 244-246, 249-250, 256-257, 259-260, 263, 298-299, 302, 306, 415, Ex's. 111, 113.) These transfers comprise the greater portion of moneys that the prosecution claimed

[2] Odd cents are omitted in all money figures herein.

were, on final analysis, and subject to some adjustments, in the nature of unreported taxable income to petitioner.

In 1953 petitioner received as ordinary income a profit on the sale of an interest in Ore Conversion Company in Chicago of $4,900, actually receiving $5,000, which was unreported on his 1953 tax return. (R. 114-118, 290, 292, 297, 301, Ex's. 1, 108.) These funds ($5,000) were used by petitioner to start Industrial, $2,500 thereof being deposited in the Salt Lake City bank account of Industrial, and the remaining portion used to pay travel expenses and promotional costs of Industrial. (R. 58-61, 70, 72, 313, 337.)

Petitioner caused substantial sums to be paid back into Industrial accounts from his wife's bank accounts during the years in question, and, through these transfers of money and other means, claimed $7,500 (the $2,500 deposited in Industrial's Salt Lake City account and $5,000 received by Industrial from the Spaulding loan) in 1953 and $9,412 in 1954, as direct advances to Industrial, and indirect advances, i.e., payments made or expenses paid to 3d parties or on behalf of Industrial business outside of Industrial's bank accounts, of $5,230 in 1953, and $648 in 1954. (R. 57-58, 60, 192, 224-225, 233-234, 254, 312-313, 319, 337, 344-345, 248-349, 352-354, 361-362, 420, 424-425, Ex's. 95, p. 9 or 1-B-2, L, K, O.) The construction and interpretation of these items of direct and indirect advances by petitioner to Industrial formed considerable portion of the controversy of the case in predicating taxable income. (R. 286-288, 298, 300, 302-328, 420-425.) The evidence shows that the prosecution knew of most of these items prior to trial, but did not give petitioner any credits against taxable income due to the same. The prosecution's expert witness, Mr. Markison, a revenue agent, admitted that an "in and out" theory was appropriate, whereby moneys transferred back and forth between petitioner's wife's accounts and Industrial's accounts were to be given appro-

priate debits and credits, and that such credits could be allowed for tax accounting for indirect advances made by petitioner on behalf of Industrial. (R. 307, 320, 323.)

The proofs of taxable income were brought forth primarily through the testimony of Mr. Markison, pertaining to bank deposits, expenditures, receipts, computations of taxable income, and deficiencies in petitioner's tax returns. Mr. Markison prepared and introduced exhibits 108-114, inclusive; which were based upon his testimony and findings from his examination of petitioner's tax records, pretrial investigations, and his interpretation of the testimony of other witnesses in the case. (R. 288-290, 294-295, 297-298, 300, 302, 307.)

The trial court admitted the exhibits 108-114 on the express understanding that they were to be written portrayal of Mr. Markison's testimony, nothing more or less than that, and that the defense was not bound thereby, or admitting the same to be true or correct. (R. 294-295.) Copies of these exhibits were given to the jury before Mr. Markison gave the underlying testimony thereto pertaining, over objection by the defense. (R. 291.)

The prosecution used "net worth" methods of proof to show that petitioner had no substantial money in 1952 and 1953, by having witnesses identify, or attempting to introduce through witnesses, some not competent, a check which had to be re-deposited, loan and credit applications made by petitioner to banks, loan companies and a retail store, by showing payments made by petitioner on loans secured in those years, and by the testimony of a person from whom petitioner allegedly tried to buy a house with no money down. (R. 28, 30-31, 80-81, 113, 161, 101-105, 107, 119-120, 158-159, 162-167, 171-174.) The trial judge ruled a number of these offers inadmissible; however, the applications and loan records in a number of instances were identified by

the witnesses involved and the substance of the papers and documents put to a substantial degree before the jury, but not thereafter offered as evidence by the prosecution. (R. 80-81, 101-105, 107, 119-120, 158-159, 162-167.) There was evidence that petitoner paid off such loans from funds not involved in the tax controversy. (R. 101-106, 110-112, 158-161.)

For the purpose of showing "the nature of the use of the Betty D. Swallow bank account", 10 or 12 witnesses testified, several days were taken at the trial, and numerous exhibits were introduced into evidence, (R. 125-126, 140-141, 143-144, 155-157, 167-169, 171-172, 178-180, 181-190.) For the purpose of showing that the funds transferred from Industrial to petitioner's wife's bank accounts were used to pay the family living and personal expenses; but, counsel for the prosecution admitted to the trial judge that the prosecution could not completely connect or tie in these expenditures and disbursements with the funds so transferred or with unreported income. (R. 90.)

The records of Industrial showed that petitioner made indirect advances of $5,230 to Industrial in 1953 spent for travel and similar expenses. (R. 233-234, 287, 319, Ex. 95, p. 9 or 1-B-2.) A promissory note dated in 1953 was executed by Industrial payable to petitioner's wife, to recognize this loan or advance, and authorized by the directors of Industrial in minutes of March 7, 1953. (R. 213, 399, Ex. H.) A Mr. Swift, a former officer and director of Industrial, was called as a witness for the prosecution, and testified that these minutes, and a number of other minutes bearing his signature, were not signed by him and that he never attended such meetings. (R. 200.) On re-call by the defense, Mr. Swift admitted he signed the minutes in question, and that he remembered that the promissory note to petitioner's wife was approved by the directors. (R. 213-214.) Mr. Swift, upon being re-called by the prosecution to correct the testi-

mony previously given that he had not talked to petitioner, (R. 278-279.) testified that he had talked to petitioner the night before he so testified, and that petitioner had told him that he (petitioner) would make it right with the witness if he would testify in favor of petitioner, and that he (the witness) might get his money back. (R. 278-279.) As outlined previously herein, the prosecution introduced evidence from a number of witnesses, testifying as to loan applications to banks, a credit application to a retail store, the payment of small loans to lending institutions, and the attempt to purchase a house with no down payment, by petitioner, and the testimony of Mr. Markison as to investigation of bank accounts of petitioner and insurance loans made by petitioner, (R. 324.) in the years 1952 and 1953, for the purpose of showing that petitioner could not have had any substantial moneys with which to advance money to Industrial in early 1953. However, the prosecution proved that petitioner had received $5,000 in the Ore Conversion Company interest sale in early 1953, and knew from its investigation of bank accounts that $2,500 was deposited into the Salt Lake City account of Industrial by petitioner, (R. 312-313.) and Mr. Hershfield testified as a prosecution witness that all the $5,000 so received by petitioner went into Industrial and that petitioner paid travel expenses of petitioner and himself on numerous trips in early and middle 1953 on Industrial business. (R. 58-61, 70, 72.) Mr. Markison, inferring that the note was without consideration, testified that the item was "'ignored that to the extent that we considered that that was not done," (R. 319.) that his conclusion was based upon the testimony previously given by witnesses Hershfield and Swift, (R. 302, 323-324, Ex. 113.) and that work papers showed the item as deposited in bank, (F. 224, 254, 322.) and admitted that it was arbitrary on his part. (R. 323.) The only testimony of Mr. Hershfield so connected was—"I know there was no money there to advance. At least, that's my personal

opinion, if it's worth a darn." (R. 76.) The testimony of Mr. Swift discloses no tangible evidence upon which to base such an inference. (R. 199-218, 277-279.) This note was paid with interest in 1954, in amount of $5,622, (R. 302, Ex. 113.) and represents part of the unreported income contended by the prosecution for 1954. The prosecution knew before trial that the proceeds of the Ore Conversion Company inferest sale were deposited in petitioner's wife's bank account in Oak Park, Illinois, and that $2,500 of this money was transferred to the Salt Lake City account of Industrial. (R. 300, 307, 313.) Mr. Hershfield's testimony tends to defeat the claim of the prosecution in this regard, for he testified that the half of the proceeds of the Ore Conversion Company interest sale were spent by the petitioner in their joint travels and expenses for Industrial, and as to extensive trips in a number of states in that period of 1953. (R. 58-61, 66, 67, 70, 72.)

The work sheet used to set up accounting records of Industrial (Ex. 95, p. 9, or 1-B-2.) showed a figure of $4,325 credited to petitioner as a total of direct money advances to Industrial, and applied to purchase of Industrial stock by petitioner. (R. 254, 312-318.) This work sheet was based upon 5 handwritten sheets furnished to petitioner's accountants when the books of Industrial were first set up by them, (R. 224-225.) and the prosecution attempted to prove that petitioner made false entries to his benefit of $1,500 or more in such papers, and the accuracy of the work sheet and papers attacked as misleading and to the improper benefit of petitioner. (R. 224-227, 252-254, 312-317.) Petitioner testified that he furnished these papers to his accountants as an aid to them upon their request, and admonished them to check them for accuracy and error. (R. 379, 380, 382, 394, 386, 403.) The accountants were present at the trial, but were not called to rebut this testimony of petitioner. It was brought out that these papers passed

two audits by the accountants, (R. 234-235, 312.) and that there were errors in them. (R. 224-225, 312-317.) Mr. Marshall, one of these accountants, and a witness for the prosecution, stated that the errors made by petitioner in the papers had been corrected substantially by journal entries, and that as they stood they would only give petitioner an improper credit of $102, which apparently had not been corrected in the audits. (R. 234, 252-253, 264.) Mr. Markison admitted that any improper credits to petitioner caused by these errors was lost in a stock account of petitioner with Industrial, (R. 318) which he knew was worthelss. (R. 318.) The $4,325 figure included the $2,500 initially deposited by petitioner in Industrial's Salt Lake City account, out of the proceeds of the Ore Conversion Company interest sale above-mentioned, and when asked why he did not allow the $2,500 be used as a credit to petitioner as an advance to Industrial, Mr. Markison stated that such amount had to be credited to stock purchase because of the entry on the work paper, (R. 317, 322.) but insisted that the $4,325 figure contained several errors. (R. 312-317.) Mr. Markison admitted that he ignored all the stock transactions in the records of Industrial (R. 327-328.) and that the minute books (Ex's. H. M, N.) did not make sense. (R. 323.)

In 1954, a transfer from Industrial to petitioner's wife's bank of $6,858 was made, and Mr. Markison recognized this transfer on his computation without including such funds in taxable income. (R. 303-304, 319, Ex. 113.) and, on cross-examination Mr. Markison first stated that it was considered as an absence of charge of income and as being given for notes payable. (R. 320-321.) The defense introduced evidence, brought out in the case for the first time, that a transfer back to Industrial from petitioner's wife's account of $9,412 was made, which off-set the $6,858 by nearly $3,000, as being deserving of credit against or an elimination from income to the extent of such difference.

(R. 420-422, Ex. K.) The prosecution obviously had knowledge of this fact before trial, due to the complete pre-trial examination of all bank accounts of Industrial and of petitioner's wife, and Mr. Markison's testimony that it had been previously considered, first as an "investment," and later, "because the money was taken out and put back into the corporation as a note payable." (R. 323.) No connecting evidence was offered by the prosecution to show that such transfers, either from or to Industrial, were predicated upon notes payable, except the verbal statements of Mr. Markison.

Testimony and exhibits corresponding thereto of Mr. Markison set forth checks totalling $8,906, not being taken into either a credit or debit status for income purposes, explained as being for purposes of "reconciliation," increased by such amount the deposits in petitioner's wife's bank account; and, similar treatment was given by Mr. Markison to checks representing the $6,585 item above-mentioned. (R. 303-304, Ex. 113, p. 1.)

Testimony and corresponding exhibit thereto of Mr. Markison varied in that Ex. 113, p. 2, at the lower left corner, under footnote 1, shows six checks totalling $2,527, but the testimony of Mr. Markison does not explain or treat on these checks at all. (R. 303-306.)

At the conclusion of the case for the prosecution, Mr. Dyas, a revenue agent, was called to testify as to his computations of the tax liability of petitioner, based upon all the evidence adduced in the case, and he gave his computations without any explanation or basis being specified, and this at the insistence of the trial judge; such computations were set forth in exhibits 115 and 116 and the same were admitted. (R. 331-333.) The defense did not object to the admission of these exhibits, on the basis that such failure

to object did not admit the correctness of the exhibits, (R. 332.) as was done in the case of the exhibits offered by Mr. Markison previously. (R. 294-295, Ex's. 108-114.)

The prosecution attempted to prove intent through the statements of petitioner made to the witnesses Watson and Edwards, to the effect that he was "judgment proof," "living out of promotional expenses of Industrial," "did not intend to file tax returns," and "all his money was in his wife's name," over objection by the defense, and the trial judge allowed part, rejected part, of this testimony, but all was before the jury. (R. 272-273, 280-282.) The prejudice of witness Watson was established by his testimony that he had testified 2 years previously as an adverse witness to the petitioner, (R. 274.) and the prejudice of witness Edwards is apparent by his testimony itself, i.e., without any ground being laid in evidence, volunteering such testimony prefaced with the remark—"Yes, very, rather interesting conversation * * *". (R. 280.) Petitioner testified he employed Watson in the prior years, and had to fire Watson for incompetence, and that Edwards was seldom available, being in bar-rooms frequently, and that he had fought Edwards in court over Industrial, (R. 351), and denied making the statements attributed to him by these witnesses. (R. 347-348.)

The prosecution attempted to prove intent through the admission of petitioner that he wrote a letter in *1959* to a Mr. Martin, who was a creditor of petitioner, suggesting that Mr. Martin take a tax loss in 1960 on the money owed, and that petitioner would give an affidavit of the loss, and would make other arrangements on the principal with Mr. Martin. (R. 411.) The questioning on the Martin letter by the prosecution commenced with the question—"Mr. Swallow, have you ever told anybody that you would prepare a false affidavit?" (R. 410.) Petitioner testified he wrote the letter to save Mr. Martin the trouble of going into court to prove his claim against petitioner. (R. 411.)

The prosecution brought out through the witnesses Randol and Watson that petitioner revised corporate minutes in Watson's home, using the stenographic help of Mrs. Randol, running to intent, presumably, to falsify records pertaining to his tax picture. (R. 268, 272-273.) Petitioner explained the reasons and urgency of this occurrence, as being deemed necessary to have back-dated minutes in light of an impending fight over control of Industrial. (R. 351.) No evidence was introduced or tied in to show any impropriety or tax advantage to petitioner by this minute revision activity in itself.

Petitioner stated in evidence that he caused the transfer of funds from Industrial accounts to his wife's accounts because he was travelling a great deal of the time and might forget to give her money, and because he was subject to being in an airplane or train accident in such travel, that he trusted her, and that he was the only officer in Industrial at the time and its business dormant some of the time; also, there was a running account between his wife and Industrial, and this arrangement was known to the accountants and had existed for a long time prior to the audits made for Industrial, and no criticism was ever made to the arrangement by the accountants. (R. 348-349.)

The defense presented evidence through the testimony of Mr. Larson, a certified public accountant, to the effect that under the "in and out" theory recognized by the prosecution, (R. 307, 320, 323.) petitioner had a $5,000 deduction or elimination from income in 1953, due to a promissory note signed by petitioner to a Mr. Spaulding upon which judgment in the Denver District Court had been obtained against the petitioner, as an advance to Industrial and because it received all the money. (R. 420, 4424-425, Ex. O.) No credit or recognition was given to this item in favor of petitioner in the computation of taxable income by the prosecution, (R. 425.) but Mr. Markison

admitted the judgment and note were known to the prosecution before trial. (R. 427.) The Spaulding note was set forth in accounting records of Industrial as a note payable, (R. 128, Ex. 83, notes payable.) which exhibit was in the possession of the prosecution for three years or more prior to trial, (R. 240, 323, 357.) and petitioner testified that such was the situation. (R. 397.)

In 1954 checks drawn on petitioner's wife's account for $648 to pay costs and expenses of a mining deal for Industrial represented an indirect advance to Industrial, and were known to the prosecution, (R. 392.) but no credit or elimination status against taxable income was given to such items. (R. 420-421, Ex. L.) The minute books of Industrial gave treatment to this transaction, and having been in possession of the prosecution before trial, such was known to the prosecution. (R. 240-323, 357, Ex's. M, N.)

The main item of income reported by petitioner in 1953 was attributed to receipt of Industrial stock for services, valued for tax purposes by his accountants at $4,782. (R. 219, 289, Ex's. 108, 1.) This item represented stock known to be worthless by the accountants who prepared the tax returns for petitioner, (R. 251, 415.) and the prosecution admitted the stock to be worthless. (R. 325.) However, this item represents approximately one-third of the taxable income for 1953 computed by the prosecution. (R. 301, Ex. 108.)

Petitioner gave testimony that he borrowed substantial sums in 1953 and 1954, which were used to pay travel and other expenses on behalf of Industrial; that commencing in late 1952 and ending in late 1954, he borrowed approximately $18,600, composed of $600 from Mr. Brubaker, substantiated by Mr. Brubaker at the trial, (R. 121.) $2,000 from Mr. Collins, (R. 344.), $12,000 from his mother-in-law, (R. 121.), $500 from Mr. Mann, (R.355.) and $3,500 from his brother. (R. 344.) This evidence was uncontroverted,

except as to the $12,000 mother-in-law loan, which was attacked indirectly through the testimony of the witness Krueser, who testified he had known petitioner's mother-in-law in California and that she was apparently without money when he knew her, and that petitioner had asked him (Krueser) for money, but, on cross-examination Krueser admitted he tried to borrow money from petitioner unsuccessfully and had written for such loan while he was in jail in Wisconsin. (R. 430-432, Ex. P.) Mr. Markison admitted he talked to petitioner's brother in Chicago before the trial, (R. 324) and that he then learned that petitioner's brother had paid a judgment against petitioner; further, that petitioner had told him (Mr. Markison) that petitioner was living off of borrowed money. (R. 324.) The evidence shows that petitioner secured loans for Industrial of more than $50,000 in 1953 and 1954, from six individuals. (R. 344, Ex's. 83, 95, 96, M, N.)

Petitioner testified he made out-of-pocket payments to Messrs. Edwards, Wight and Ritter, to further Industrial business, amounting to $1,250 in 1953 and $3,250 in 1954. (R. 310, 311, 340-341.) No refutation of these payments was made by the prosecution, and Mr. Edwards was available as a witness for the prosecution. Mr. Wight and Mr. Ritter were mentioned repeatedly in the minute books of Industrial (Ex's. M, N) and in testimony of petitioner, both on direct and on cross-examination. (R. 335-337, 340-341, 344, 355, 378, 351, 365, 375, 379, 396.) Mr. Markison admitted that petitioner informed him before the trial of payments made by petitioner out of pocket and not by check to Mr. Wight, and payments made by petitioner for the travel or use of Mr. Edwards. (R. 310-311.) The records of Industrial reflected payments out of Industrial accounts to Messrs. Edwards and Wight (R. 310-311.).

Petitioner testified he travelled extensively on Industrial business in 1953 and 1954, and so spent $8,825 in 1953

and $17,200 in 1954, using all funds from all sources, provided in part by Industrial and the remainder out of funds he borrowed. (R. 342-344.) The testimony and allowances of Mr. Markison showed only $4,039 paid for travel expenses in 1953 out of Industrial funds, and similarly, $8,490 in 1954. (R. 342-344.) These differences between petitioner's total expenditures and those provided by Industrial amount to $4,186 in 1953 and $9,720 in 1954, subject to adjustment for allowances made by Mr. Markison for personal travel deductions of $600 in 1953 and $490 in 1954, (R. 311-312.) and "short trip" travel expenses claimed by petitioner of $1,500 in 1954. (R. 355.) Such travel and expenses were substantiated and corroborated to a large degree by the testimony of witnesses for the prosecution, Mrs. Randol, (R. 294.) Mr. Hershfield, (R. 58, 60, 66, 67, 70, 72.) Mr. Edwards, (R. 280, 283.) and Mr. Marshall, (R. 242.) wherein it was brought that petitioner travelled about 50 percent of the time in 1953 and 1954 and paid the expenses of others connected with Industrial business for as long as a month at a time. Mr. Markison heard this testimony and the only refutation of petitioner's testimony as to the extent of such travel and expenses and the testimony of the other witnesses in such regard was his assumption that the allowances in his computations were reasonable (R. 309-312.) and upon request of defense counsel, Mr. Markison did not bring forward any basis or computation to predicate his conclusion in this regard. (R. 309-311.)

The evidence discloses that Von Tobel and Carr, a firm of certified public accountants, prepared the accounting records of Industrial, had the books and records and vouchers in their offices, prepared two separate opinion audits of such books and records, had access to all financial and other files and records of Industrial, gave general accounting advice to petitioner and Industrial, prepared tax returns for Industrial, and prepared the 1953 and 1954 income tax returns for petitioner. (R. 131-132, 219, 220,

230, 232, 235, 242, 250, 257, 259, 263, 412-414, 416, Ex. J.) In this work the accountants recommended and set up an account called "promotional expense" for Industrial, and charged to this account personal living expenses and travel expenses of petitioner pursuant to this recommendation, (R. 245-246, 247-248, 255, 257, 259-260.) and that this account was considered a catch-all or dead end account once posted to, and was not reviewed for deductible or expense items and similar considerations, (R. 246-247, 259.) and amounted to approximately $185,000 as of December 15, 1954. (R. 134, Ex. 99.) Two of the accountants, Mr. Moss and Mr. Marshall, admitted that there were many errors[1] in their accounting and tax accounting for Industrial and for petitioner, that there was a definite lack of coordination between their firm members in this work, that had there been proper coordination and checking on a professional basis the tax returns of petitioner would have been properly prepared, that most of appellant's tax information was in their office when the petitioner's tax returns were prepared, and that there were errors in the books and records of Industrial. (R. 229-251, 260, 415-416.) Mr. Moss testified he picked up travel vouchers and data from Industrial and petitioner, (R. 413, 415,) and Mr. Marshall testified he received them. (R. 240-241.) Mr. Marshall testified to the effect that there was travel expense over and above that shown on the books of Industrial, necessarily spent by petitioner, (R. 247.) which was buried in the promotional expense account. (R. 259.) Mr. Marshall testified that Mr. Moss did most of the counseling with petitioner in person. (R. 242.)

[1] Examples of these errors are: failure to account for withholding tax on Industrial employee (R. 230-231); failure to detect errors in work sheets in two audits (R. 232-233.); failure to verify payments for original issues of corporate stock (R. 236.); failure to make accounting of numerous travel vouchers submitted by petitioner (R. 240-241, 248.); failure to find errors in petitioner's tax returns on office review before filing (R. 249.); failure to give tax treatment to deductible items of Industrial (R. 248).

The evidence is uncontroverted that petitioner relied upon the accountants to prepare his personal and the Industrial tax returns, (R. 242, 347, 350, 356, 405, 408.) and that at no time did petitioner request any special tax or accounting treatment be given in his behalf or that of Industrial, (R. 133, 134, 248, 414.) that petitioner never withheld any information from any of the three accountants with whom he dealt, (R. 133, 248, 412.) or from his bookkeeper, Mrs. Randol, (R. 270.) and that petitioner never dictated in any way the method or manner posting entries or the entries themselves in such books and records, (R. 133-134, 248, 269-270.) and that the accountants were satisfied with the data and information furnished by petitioner. (R. 244-245, 248-249.) Petitioner testified that the tax returns were handed to him by Mr. Moss, that he queried whether they were short, and asked why the Ore Conversion money was not on them, and that he was told "that's the way it came out" and "they were in the business to save him money," and that "Industrial got all the money;" that he merely glanced at the returns, was not fully aware of what was on them, that he was not aware of all the omissions of income necessary to be reported, and that he assumed the accountants had made all necessary adjustments, and that he accepted the explanation of the accountants. (R. 350, 356, 360-361, 405, 408.) Mr. Moss could not remember whether or not these conversations took place, as well as a number of other matters. (R. 416.)

Petitioner testified that he told both Mr. Moss and Mr. Marshall, his accountants, that he received the $5,000 sale proceeds for the Ore Conversion Company interest in Chicago before the 1953 tax return was prepared by them, in discussion regarding the setting up of the books of the corporation. (R. 361.) Being asked on examination whether petitioner did tell him about the receipt of the $5,000, Mr. Moss replied—"No Sir, I don't recall it, sir." (R. 416.)

Mr. Moss gave similar answers to a number of questions on both direct and cross-examination. (R. 413-416, 418.) Upon being asked the question if petitioner informed him of the $5,000 receipt in 1953, Mr. Marshall replied—"Not to the best of my recollection." (R. 426.)

After trial a motion and request for a supplemental proceeding to determine the truthfulness and correctness of answers given by the juror Lewis on *voir dire* examination, and to correct the record in this particular, was made to the trial court by counsel for petitioner. (R. 7-8.) This motion and request was denied by the trial judge. (R. 9.)

A motion for judgment of acquittal was entered by petitioner at the close of the case for the prosecution, (R. 333-334.) and was renewed at the completion of all the evidence in the case. (R. 432.) A written motion for judgment of acquittal and a motion for new trial were filed by petitioner May 16, 1961, (R. 4-9.) which were denied by the trial judge June 2, 1961. (R. 9.)

Jurisdiction Of The Court Of First Instance

The jurisdiction of the United States District Court for the District of Colorado as the court of first instance is based upon an indictment made by the Federal Grand Jury in that district filed February 16, 1960, charging petitioner with violations of Title 26, Sections 145(b) and 7201 of the United States Code. (R. 2-3.)

REASONS FOR GRANTING THE WRIT

I (Question I)

A. *The decision of the Court of Appeals was based largely on these proofs of intent, and, if allowed to stand as precedent, will open doors to unsound and unreasonable proofs, and is conflicting with the decision of the Court*

in Tot v. United States, 319 U.S. 463, and with decision of the *Court of Appeals for the Seventh Circuit in United States v. Litberg*, 175 F. 2d 20.

The phrase "'judgment proof'' is in common parlance, and one used by respectable persons to mean diverse things. What one person might mean by claiming such status could well be very much of a different thing to another's adoption of the phrase. There is ample evidence in the case to predicate a legitimate meaning in its use by petitioner, for there was direct evidence that he was approximately $90,000 or more in debt. The "evil" intent or motive required by federal cases generally is obviously lacking here, and much of a different concept generally.

The phrase "all my money is in my wife's name" is almost innocent sounding. To approve this phrase as implying criminal intent to file fraudulent income tax returns *with one's wife* is just not logical. Many meanings can be dreamed up for this phrase.

The phrase "living out of promotional expenses of Industrial" has special meaning here, for that is exactly what was brought out in the facts over and over again, as an accounting matter and a corporation policy. How could petitioner be guilty of "evil" intent is such particular, when the phrase and mode of conduct are identical and as recommended by and approved over a two-year period by a firm of certified public accountants and by fellow directors of Industrial. The double meaning of the phrase admits of innocence for one purpose, impropriety for another. It could be in contradiction to civil law and stockholder's rights, but does not predicate criminal intent to file thereafter fraudulent income tax returns. There is no probative strength here as relates to petitioner's circumstances, and as applied generally, is unsound. The decision of the Court of Appeals is unreasonable, in light of the circumstances

of this case, and conflicts with the principles in *Litberg*. This case is even stronger than *Litberg*, for there the defendant was aided by liquor, and here petitioner has advice of professionals to aid him. Further, the ruling is in conflict with the principles set forth by this Court in *Tot*, regarding rational connection or lack of connection between fact proved and ultimate fact presumed as not being found in common experience, and that there is not rational following of the ultimate to the proved in this instance.

The statement that petitioner did not "intend to file tax returns" is directly opposite to the facts which do have legal significance favorable to petitioner, so this phrase could not, in any event, have its absolute meaning as proof of an element to a crime.

These statements are not cumulative bits of evidence, but are so *substantial* in this case as to be the actual crux and turning point of the decision of the Court of Appeals, and are *the only evidence in the case being considered worthy of mention* by the Court of Appeals. Appendix A, *infra*, p. 45.

These statements were introduced, and part allowed to stand as admissible by the trial judge, over the objection of counsel, and at their strongest, are in the class of innuendo.

II (Question II)

A. *The decision of the Court of Appeals ignored what petitioner contends were obvious and glaring defects in the prosecution's basic proofs of taxable income, and this Court should exercise its power of supervision to remedy the effects of such decision.*

The expert and key factual witness for the prosecution, Mr. Markison, by determinations he admitted were arbitrary, denied petitioner a possible $2,500 to $5,320 elimin-

ation of taxable income in 1953, and by this means forced petitioner to accept an added item of income in 1954 of $5,622 which otherwise would have been non-taxable, and further, based his findings upon testimony which did not warrant such finding, and upon books and papers which he knew were full of errors. He simply chose those entries which suited him for prosecution purposes, and ignored those which did not aid him, but without logical and reasonable distinction. His conclusions involved determinations of both fact and law, when he first described a $3,000 difference in credits and debits between petitioner and Industrial as given for notes payable, and then as an investment. No substantial, reasonable or legal basis was clearly shown, and in some instances even offered, for these decisions by Mr. Markison. In regard to a book entry showing petitioner entitled to a credit of $5,320 for money advances outside the bank accounts of the corporation, Mr. Markison contended that such advances could not be, even in the face of his prosecuting petitioner for receiving a similar amount and not reporting the same in the same period of tax time, and the absolute uncontroverted fact that petitioner spent about one-half of $5,000 in deductible expense for Industrial, proved by the prosecution's own witness, Mr. Hershfield. Mr. Markison presumed that petitioner could not have had the difference in approximately $2,500, but the evidence showed facts to the contrary, i.e., petitioner travelled extensively at that time, paid off numerous loan accounts, and was busily engaged in promoting a new enterprise, and borrowed from a number of people to help in the venture. Mr. Markison offered as a primary showing the testimony of two witsesses, Hershfield and Swift, Hershfield testifying that it was "merely his opinion, if it was worth a darn", and the other witness saying nothing on this point. It was not even good innuendo. Mr. Markison spent considerable time at the trial to show that petitioner made incorrect entries on work papers of Industrial, to

gain an inference that petitioner received an improper $1,500 credit with Industrial, but could not give any competent, professional, accurate reasoning or basis therefor, and Mr. Marshall, himself a certified public accountant who reviewed these records at least 3 or 4 times, testified repeatedly that the errors had been rectified, except for an insignificant $102 credit to petitioner. This was confusion based on error, and had innuendo of wrongdoing attached insofar as petitioner was concerned. Mr. Markison further had to admit that whatever the amount improperly credited to petitioners, it was lost in worthless stock. Further, a $4,325 item was credited to petitioner, and contained several errors, and required reduction. Mr. Markison restricted petitioner, however, in the face of all the error in setting up the figure, to that portion thereof as credited purchaser with the purchase of stock in Industrial to the extent of $2,500; otherwise, it could have been used by petitioner as a credit against taxable income. Mr. Markison ignored the stock records, minute books, and other records as being full of error, and he knew the weaknesses and deficiencies of them, and that these errors were the fault of the accountants who set them up primarily, but attempted to cast the blame onto petitioner. These points and others appear in the Statement, *supra*.

Mr. Markison put some entries on an exhibit he introduced, intended and labelled to be a portrayal of amounts transferred from Industrial to petitioner's wife's accounts, which had no reason or relation to the exhibit, and could only serve to confuse the jury on the issues and enlarge considerably the amounts deposited, again as innuendo, but he testified that such was necessary for purposes of "reconciliation." This explanation was nothing but accountant's double-talk. All this and the foregoing made the basic proofs of taxable income argumentative, conclusive, confusing, and lacking in necessary precision and certainty.

See *Lloyd v. United States*, 226 F. 2d 9, 16; *United States v. Altruda*, 224 F. 2d 935, 938, 939, 942, 943, 944; *United States v. O'Malley*, 117 F. Supp. 895.

III (Question III)

A. *The decision of the Court of Appeals concludes the petitioner to be heard with respect to a violation of his constitutional rights, based on procedural matters, and unduly restricts the fair determination of a serious matter.*

The fact that the affidavit of juror Lewis (R. 8-9.) reads like the record is precisely why petitioner requested the supplemental proceeding. Attached as exhibit A to Petition for Rehearing filed with the Court of Appeals, is affidavit of Mr. Lowther, who heard the *voir dire* examination of the juror Lewis, and his affidavit sets out the untruth and incorrect answers given by the juror. A copy of the Petition for Rehearing and such affidavit are included in the Transcript of Record, certified by the Clerk of the Circuit Court, and lodged with the Clerk herewith.

To conclude petitioner in this particular, because his counsel did not handle the matter of seeking the proceeding in strict conformity with custom and practice, is harsh, oppressive, and militates against a concept of liberal and accessible justice. The motion and request was timely put before the trial court, being incorporated in the motion for new trial, and was not an imposition upon the federal court system.

It is here pressed upon the Court that federal courts should welcome such matters being brought to attention, if serious and not presented for an obvious non-acceptable purpose. See *Herman v. Claudy*, 350 U.S. 116, 121, 123.

IV (Question IV)

A. *The decision of the Court of Appeals ruled that the "lead rule" was inapplicable, in conformity with the fed-*

eral decisions, and the Court should settle the question raised as to why is such protection denied defendants in in other tax cases, and particularly, in the instances that the different methods of proof are inter-mixed, to settle confusion and to make certain a point of law which this Court has not heretofore ruled on.

This case has elements of the "net worth" method of proof, and was an example of the confusion that can arise from such interweaving of the methods. Elements of surprise and innuendo creep into such trials, and parties are is the dark, so to speak, as to what to expect next. Nevertheless, it is presented to the Court that in fairness to defendants in "specific items" cases, where facts make the rule applicable, the prosecution should be required to investigate leads, reasonably susceptible of being checked, according to the rule in *Holland*. Further, favorable evidence found in investigation of such leads should be recognized as such, or defeated by a reasonable answer thereto.

There were some excellent leads in this case. The prosecution had complete knowledge of and lead to the $5,000 Spaulding loan which petitioner secured in 1953 and Industrial received all the loan proceeds. Mr. Markison contended the books set up an account payable on this account. Nevertheless, petitioner alone signed the note, and the judgment still stands against him alone. The books and records of Industrial are so loaded with error that even Mr. Markison, as an expert, should be doubtful of his own contentions here. This evidence was completely ignored by the prosecution and is a perfect example of why the "lead rule" should be here applied, for the prosecution knew everything about it, and because it favored petitioner to the extent of $5,000 for that year, roughly one-third of the total charged against him.

A lead to the fact that petitioner had approximately one-half of the $5,230 to indirectly advance to Industrial in early

1953 was supplied by the prosecution's own basic proof of the unreported receipt of $5,000 in the Ore Conversion deal. One might ask—how much better could the lead be, for it was also one of their major weapons in the struggle. The confirmation of the favorable aspect of the evidence to petitioner was supplied by the prosecution's witness Hershfield, who clearly testified that all the Ore Conversion money received by petitioner went into Industrial, one-half into the bank and one-half spent just as claimed by petitioner. At its weakest, this is a perfect half-lead.

A perfect lead is found in that petitioner told Mr. Markison, the revenue agent, in pre-trial investigation, that he had paid out of pocket moneys to Messrs. Wight and Edwards, and, the fact that Mr. Edwards was called by the prosecution as its witness, and was never interrogated on this point, is indicative that the prosecution acquiesced.

A perfect lead is found in the transfer of $9,412 by petitioner to Industrial in 1954—it was completely worked over by the prosecution in its pre-trial computations, but was not brought out to favor petitioner, on illogical reasoning and the legal conclusions of the expert witness, i.e., the $3,000 difference was a loan, and later, an investmest, and no positive explanation later.

The major item of income reported by petitioner in 1953, $4,782, by reason of receipt of Industrial stock for services, is a perfect lead that petitioner was prejudiced by attributing substantial income to an item known to be worthless by the prosecution, and carried over into the case as one-third of petitioner's tax liability. The unfairness of this is loud and clear in a proceeding which ignores form of papers and re-constructs completely the substance in order to predicate tax liability.

Other leads existed in the case. Petitioner travelled about one-half of the time over a two year period, paying ex-

penses of himself and others. This is expensive, and the travel allowances assumed reasonable by Mr. Markison are not a complete answer to the leads furnished through testimony of the prosecution's own witnesses, Randol, Hershfield, Edwards, Marshall, and of petitioner himself, as was found in *Holland*. Diverse leads existed to indicate to some degree that petitioner was borrowing substantial sums to live on and to promote Industrial, and petitioner told Mr. Markison this generally. The books and records of Industrial showed this, plus the pre-trial investigations of the prosecution. The negligence of petitioner's accountants was admitted by them repeatedly, and is consistent with their failure to have petitioner properly compile and record his financial transactions, including his travel deductions and borrowings. This fact was undoubtedly known to the prosecution, and they took advantage of this weakness of petitioner's position.

The foregoing illustrates the need for a clear pronouncement on the subject of "leads" as applied in cases other than "net worth" cases, and the Court is urged to consider the argument that petitioner's case is deserving that the "lead rule" be applicable to his case and to similar cases. For otherwise, there is not enough compulsion provided by law to require prosecutors in income tax cases to adhere to the standards of fair play that federal criminal justice standards pronounce. *United States v. Keenan*, 267 F. 2d 118, does imply, at p. 122, that good faith is required where both methods of proof are used, but there is need for clarification on this point, and just what good faith has to amount to in such instance.

V (Question V)

A. *The decision of the Court of Appeals ignored the various objectionable features of the basic proofs of taxable income, as not worthy of mention, and by its sanction*

of the proceedings below, has decided matters of federal criminal justice in conflict with applicable decisions of the Court.

It is contended that, the actions of the prosecution in ignoring evidence favorable to the petitioner, or in raising co[illegible]tious, strained and confusing issues and interpreta[illegible]as of petitioner's tax records and facts related thereto, are tantamount to suppression of evidence favorable to petitioner. A fact in accounting, or one requiring legal interpretation in relation to financial transactions, can be distorted, strained, ignored, or interpreted by relation to other facts and circumstances, so as to suppress the true and reasonable view of it. The correction and adjustment of such method is either rebuttal, discovery of the true facts or interpretation, or cross-examination by the opposition. Such retaliation, however, is often ineffective, difficult, and unable to fairly cope with the problem presented. There was suppression of true meaning of financial transactions and related facts by the prosecution in this case, e.g., the ignoring of the $5,000 Spaulding loan, the strained construction of the $3,000 difference in "in and out" credits, the fact that petitioner reported $4,782 of worthless income and was held to it, the contrivance to enlarge a $102 error on the books into a $1,500 unmerited credit, which if true, was actually settled in a worthless stock account, the ignoring of a legitimate deduction of $648 evidenced by known checks and records, and such presentation of basic evidence went way beyond the usual realm of contended facts in a criminal trial—they were intended as traps, but based on strained construction, confusing presentation, and were rooted in contentitious and argumentative matters of fact and of law. It is withholding of material evidence, amounts to overzealous prosecution, is not a civilized standard of procedure, offends a sense of justice, and is unfair use of evidence. Such being established, the case for the prose-

cation conflicts with principles of cases decided by the Court. *Napue v. Illinois*, 360 U.S. 264; *Jencks v. United States*, 353 U.S. 657; *Rochin v. California*, 342 U.S. 165; *Bollenbach v. United States*, 326 U.S. 607; *McNabb v. United States*, 318 U.S. 332; *Lisenba v. California*, 314 U.S. 219; *Berger v. United States*, 295 U.S. 78.

VI (Question VI)

A. The decision of the Court of Appeals, by leaving the matter of proof of taxable income to the determination of the jury, when adduced by and through a key witness who is both a factual and expert witness, decided a question of procedure on a federal question which has not been but should be settled by the Court.

It is contended that, when tax cases are presented largely through the testimony and findings of one person, usually as a factual witness and as an expert witness, the good judgment of the expert becomes overcome by the bias of the prosecutor, and unfairness is created, which the Court should clarify. The "overzealous" prosecution doctrine of *McNabb, supra*, certainly applies here. The problem is, how to separate the separate functions of one mind. The duality of the witness creates much confusion, for the jury necessarily leans on such witness for proof of taxable income, as may be the case of the trial judge and the defense counsel, and an overzealous witness can mis-use the trust. That these problems exist, see *Greenberg v. United States*, 280 F. 2d 472.

Also involved, as in this case, the contentions and argument over what is a loan, an investment, a legal withdrawal from a corporation, a legitimate expense or deduction from taxable income, and so forth, all being taken from the civil side of tax law, and often complex and subject to diverse interpretation. The jury should not be expected to be the moderator of all these technical and legal matters,

for their function is basically to determine guilt or innocence, and fairness in criminal tax cases would best be attained by restricting jury deliberations to the element of intent. The jury may disbelieve the expert witness, and the tax matters are still left up to them. *United States v. Johnson,* 319 U.S. 519.

VII (Question VII)

A. *The decision of the Court of Appeals, by its silence on the defense of reliance upon accountants, under the facts of this case, is in conflict with applicable decisions of the Court, and is in conflict with applicable decisions of other Courts of Appeals, and decided a federal question which has not been but should be settled by the Court.*

The decision is in conflict with *Mortensen v. United States,* 322 U.S. 369, *Hansen v. Haff,* 291 U.S. 559, and *Litberg, supra,* and is in conflict with the decision of the Court of Appeals for the Third Circuit in *United States v. Pechenik,* 236 F. 2d 844, and with the decision of the Court of Appeals for the Sixth Circuit in *Lurding v. United States,* 179 F. 2d 419. The decision also conflicts with the decision of the District Court for the Northern District of Illinois in *United States v. Goodman,* 190 F. Supp. 847.

The evidence is absolutely uncontroverted that the accountants prepared petitioner's tax returns, having all the data on unreported income, except one item is 1953, in their office, and that they were negligent in the use of such data and in the preparation of the tax returns for both years, as they were in other matters of accounting for petitioner and Industrial, and that petitioner relied upon them to prepare the returns. There is absolutely no evidence in the case to intimate, let alone infer, collusion or dictation by petitioner. He could not have done it alone. The filing of the returns had an innocent purpose, and under *Mortenson* and *Hansen v. Haff,* could not be

separated into something part innocent and part culpable. Any separation requires that petitioner had superior knowledge of his *taxable* income, in light of the entire picture, than his accountants, which is not borne out by the evidence, or fairly inferred therefrom. Petitioner did not prepare the returns, nor actually assist in such preparation, in reliance upon his accountants, who, he believed, were fully informed as to all material matters. By analogy to *Mortensen*, even if petitioner might have had a purpose to do improper things in some of his actions in evidence, at some time down the line of his conduct, this fact, if established, can not invest criminal intent to the filing of the returns under the facts here presented for review, for petitioner was handed his returns already made for his signature, and he signed them and they were filed. The primary purpose here was obviously to file the returns based upon the accountants' work, and not to defeat or evade taxes, and to conclude otherwise is to take an artificial and unrealistic view of the nature and purpose of the filings by petitioner, particularly since two consecutive years are involved, under *Mortensen*. *Lurding* requires direct proof or proof of circumstances that petitioner knew of his tax liability in order to convict, which is lacking here. It is not reasonable to infer that petitioner knew he had tax liability under all facts in this case, for his deductions were considerable and he was borrowing money and spending it on behalf of Industrial in substantial amounts over long periods of time. *Pechenik* makes it clear that reliance in good faith upon conduct of accountants is not a punishable event. There is no evidence whatever that petitioner did not rely in good faith upon his accountants, is fact, he even went too far in such reliance, as events and facts later proved. He did not, and could not have done, without collusion with the accountants, the very thing that he is being punished for. The *Goodman* case clearly states that criminal liability is not to be established by proof of negligence,

however *gross*, mere laxity or a careless disregard of the duty imposed by law, being not probative of wilfulness. The situation here is of this category, for petitioner testified he did not pay much attention to the returns presented, in reliance upon the accountants. The testimony as to whether or not petitioner informed his accountants of the receipt of the $5,000 in 1953 in Chicago is not sufficient to reasonably infer that petitioner intended to defeat taxes when the returns were filed, in light of the circumstances that petitioner put all the money into the corporation and thought the accountants knew all this. His mental conditioning here is analogous to the situation in *Litberg*. The accountants did not refute his testimony in this particular, being not able to remember, and in light of all their other shortcomings, it is certainly not surprising that they might have been informed about the $5,000 receipt and forgot it some 8 years later at the trial. The witness Moss could not recall a good number of matters that he might have been expected to, and the oversights and careless handling of the affairs of petitioner in their hands speaks for itself.

VIII (Question VIII)

A. *The decision of the Court of Appeals ignored the prejudicial effect of the Martin letter testimony, and by its silence, decided a question of federal criminal procedure in a way so as to conflict with decisions of the Court.*

The Martin letter testimony was highly prejudicial and is condemned by *Smith v. United States*, 348 U.S. 147, *Kotteakos v. United States*, 328 U.S. 750, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, *Boyd v. United States*, 142 U.S. 450, and *Tot v. United States*, *supra*.

The case is one of delicate balance, for the best evidence running to intent was contained in the out of court statements set forth in I, *supra*, and the Martin letter testimony. This poses the case subject to prejudice which might not

otherwise be the situation, for the other out of court statements were clearly not probative and were not substantial proof. The failure of counsel to object to this testimony was inadvertent, and under *Johnson v. United States*, 318 U.S. 184, the statement is not rendered competent by such failure to object.

Further, the decision of the Court of Appeals is in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Lloyd, supra.*

This letter was written 5 years after the last indictment year, and has no connection to the charges of the case, and further, no proof exists that it went beyond an offer. These features condemn its competency under rules of evidence, and prejudicial if used.

IX (Question IX)

A. *The decision of the Court of Appeals is in conflict with decisions of the Court, and with decisions of other Courts of Appeals.*

The decision in this case is in conflict with decisions of the Court rendered in *Mortensen, supra, Hansen v. Haff, supra, Litberg, supra,* and *Spies v. United States*, 317 U.S. 492.

The decision is in conflict with the decisions of other Courts of Appeals, i.e., *Call v. United States*, 265 F. 2d 167, and with *Pechenik, supra,* and with *Lurding, supra.*

Argument on this Question has been covered in argument, *supra,* except that petitioner wishes to state that there is no evidence in this case that comes substantially within the standard or criteria of *Spies,* or the illustrations set forth therein.

X (Question X)

A. *The decision of the Court of Appeals by its silence on the point of law decided a matter of federal law which*

conflicts with the decision of the Court of Appeals for the Fifth Circuit in Small v. United States, 255 F. 2d 604.

In *Small,* the court ruled that even as late as the trial, if the defendant introduced evidence of deductions, the burden was then on the prosecution to show the deductions claimed by the defense did not exist or were not sufficient to offset the income in question. In this case the petitioner introduced much evidence, in part corroborated by other witnesses, of travel expense and payments to others as out of pocket expenses. The prosecution did not negate this testimony in any substantial degree, and in some instances not at all, and similarly, petitioner testified as to loans used in the business of Industrial, which was substantiated in part by other competent witnesses, which evidence was not rebutted to any substantial extent by the prosecution; thus, the prosecution did not meet the burden imposed by *Small,* and the proofs of taxable income rendered insufficient.

Attention of the Court is directed to *Northern Natural Gas Company v. O'Malley,* 277 F. 2d 128, a civil case, wherein the court stated:

> "Where a taxpayer shows he is entitled to some deductions but cannot definitely show how much, the Court should not deny all deductions but should make as close an approximation of the deduction as it can."

While not a criminal case, the principle of *Northern Natural* should have some application to criminal inquiries.

XI (Question XI)

A. *The decision of the Court of Appeals ruled that the use of the exhibits introduced by the expert witness, Mr. Markison, was appropriate, which ruling is in conflict with the decision of the Court of Appeals for the Fifth Circuit in Steele v. United States,* 222 F. 2d 628.

The court in *Steele*, at page 630, ruled that similar exhibits "* * * were not under any circumstances to be taken to the jury as exhibits."

In this case the Court of Appeals ruled that the use of Ex's. 108-114 was appropriate. Appendix A, p. 46. They were shown to the jury before Mr. Markison testified with respect to them over objection of counsel, and later the exhibits were taken to the jury room.

The Court should resolve this problem of handling basic evidence in tax cases.

CONCLUSION

Petitioner respectfully submits that the United States Court of Appeals for the Tenth Circuit has decided erroneously, material matters of the proof of the elements of the offenses charged, and has refused to correct the prejudicial matters with respect to the constitutional rights of petitioner and under considerations of the proper administration of federal criminal justice affecting the trial of petitioner.

WHEREFORE, Petitioner prays that this Petition for Writ of Certiorari be granted; that a review of the cause herein be made by this Honorable Court, and the judgments of the United States Court of Appeals for the Tenth Circuit and of the United States District Court for the District of Colorado be in all things reversed, and for such other relief in the cause as this Honorable Court deems just.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

June Term, 1962

FILED
United States Court of Appeals
Tenth Circuit
JULY 11, 1962
ROBERT B. CARTWRIGHT,
Clerk.

C. GEORGE SWALLOW, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 6859

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Karl W. Farr, Jr., Attorney for Appellant;

Norman Sepenuk, Attorney, Department of Justice, (Louis F. Oberdorfer, Assistant Attorney General, Joseph M. Howard, Attorney, Department of Justice, and Lawrence M. Henry, United States Attorney, were with him on the brief) for Appellee.

Before MURRAH, Chief Judge, and BREITENSTEIN and HILL, Circuit Judges.

HILL, Circuit Judge.

The appellant, C. George Swallow, was indicted, tried and convicted on two counts of wilfully attempting to evade his income tax for the years 1953 and 1954, by filing false and fraudulent income tax returns.[1]

Swallow and one Hershfield, early in 1953, organized the Industrial Gas Company, formed to develop oil and gas properties. Each became an officer of the company and it was agreed each would draw a salary from the company of $1,000 per month. Industrial soon commenced business operations and derived its income mostly from the shipment of natural gas through leased pipelines to customers in South Dakota. A bank account was opened with appellant and Hershfield authorized to jointly draw corporate checks upon the same. Hershfield resigned as President in August, 1953, and sold his stock to Charles W. Swift who became President in September, 1953. During August, 1953, another corporate bank account was opened by appellant at the First National Bank of Denver and, after Hershfield resigned, Swallow alone had authority to draw checks upon this corporate account.

By the government's evidence it sought to prove that all of the items of alleged unreported income, except one, came from this corporate bank account. The government's case was presented on the "specific items" theory, which simply means the proof of specific items of income which the government contends were omitted from the return. The theory is certainly not a complicated one, and by its use, the government proceeded to prove, by both direct and circumstantial evidence, each separate item of alleged unreported income relied upon to make the case.

For the taxing year, 1953, the evidence reflected generally three categories of unreported income. The largest single

[1] Count 1, covering 1953, charged a violation of Internal Revenue Code of 1939, 26 U.S.C.A. 145b; Count 2, covering 1954, charged a violation of Internal Revenue Code of 1954, 26 U.S.C.A. 7201.

item involved the purchase and sale of a 7½% interest in Ore Conversion Company by Swallow, showing a profit of him by such trahsaction in the amount of $4900. The second category covers three amounts paid directly by the corporation but for the benefit of Swallow. These included $152.90 to Hobson Motor Company for repairs to his automobile, $375.00 to Dr. Levy for rental of the residential property where Swallow lived and $145.00 to Public Storage and Fixture Company for rugs and beds. The third category covered the amount of $5,362.03, diverted from the corporation during the taxable year by checks payable to Mrs. Swallow, with such funds being thereafter used to pay the Swallow family's personal expenses. The total of the three categories was $10,934.93.

The evidence concerning unreported income for 1954 showed a similar pattern of use of funds. A payment of $345.05 to a man's clothing store out of corporate funds; a check from the corporation to Mrs. Swallow for $1,000, charged as back salary due appellant; the payment of principal and interest on a promissory note in the total amount of $5,622.25 by the corporation to appellant's wife, which note the government contended was fictitious and did not represent a bona fide loan from the wife to the corporation; and again numerous instances during that year of payments of corporate funds to Mrs. Swallow's bank account and the use thereafter of such money to the family's personal expenses. The government's evidence on this count showed unreported income totaling $15,002.78.

As defenses to the prosecution, Swallow first denied he had not reported all of his income, and further affirmatively contended: That he did not report all of his allowable deductions; that Industrial funds paid for his personal benefit were in fact repayments of loans or reimbursements for money he had paid out for the benefit of the corporation;

and that he relied in good faith upon the accountants who prepared his income tax returns.

The major portion of appellant's brief concerns the sufficiency of the evidence to support the verdict of guilty. In our determination of this question, the evidence and inferences to be drawn therefrom must be viewed in the light most favorable to the prosecution.[2] It is also elementary that circumstantial evidence, upon which reasonable inferences can be based, is sufficient.[3] Although each count of the indictment shows the specific amount of unreported income as contended by the government, it is not necessary for it to prove the exact amount of unreported income, but it is sufficient if the evidence shows the unreported income to be in a substantial amount.[4]

As the court below advised the jury "the gist of both offenses charged in the indictment is a wilful attempt on the part of the defendant to evade or defeat a tax imposed by the income tax law." The offense is complete when the taxpayer files a false and fraudulent return with intent to evade or defeat any part of the tax due.[5] A wilful intent to evade or defeat tax liability may be inferred from the conduct of the taxpayer.[6]

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[2] Sandoval v. United States, 10 Cir., 285 F. 2d 605; Corbin v. United States, 10 Cir., 253 F. 2d 646; Evans v. United States, 10 Cir., 240 F. 2d 695; Canton v. United States, 8 Cir., 226 F. 2d 313, cert. denied, 350 U. S. 965.

[3] Evans v. United States, supra.

[4] Fischer v. United States, 10 Cir., 212 F. 2d 441; Rose v. United States, 10 Cir., 128 F. 2d 622, cert. denied 317 U.S. 651.

[5] Hayes v. United States, 10 Cir., 227 F. 2d 540; United States v. Croessant, 3 Cir., 178 F. 2d 96, cert. denied, 339 U. S. 927, Willingham v. United States, 5 Cir., 289 F. 2d 283, cert. denied, 368 U.S. 828; Myres v. United States, 8 Cir., 174 F. 2d 329, cert. denied, 338 U.S. 849; Cave v. United States, 8 Cir., 159 F. 2d 464, cert. denied, 331 U.S. 847.

[6] Hooper v. United States, 10 Cir., 216 F. 2d 684; Graves v. United States, 10 Cir., 191 F. 2d 579; Gaunt v. United States, 1 Cir., 184 F. 2d 284, cert. denied, 340 U.S. 917; Battjes v. United States, 6 Cir., 172 F. 2d 1; United States v. Rosenblum, 7 Cir., 176 F. 2d 321, cert. denied, 338 U.S. 893; Norwitt v. United States, 9 Cir., 195 F. 2d 127, cert. denied, 344 U.S. 857.

The record shows that counsel for the government was meticulous in his presentation of the case. The evidence was adduced in an orderly fashion and covered well every single item of alleged unreported income. In addition, several witnesses testified to statements, made by Swallow, clearly indicating his intention to evade income taxes and directly proving wilful intent. A detailed discussion of that evidence here, which we have carefully reviewed, would serve only to unnecessarily extend the length of this opinion. We so conclude because of the overwhelming nature of the proof by both direct and circumstantial evidence. Over forty witnesses testified on behalf of the prosecution and nearly one hundred exhibits were offered and admitted through these witnesses. It is true, the defendant, by his own testimony, attempted to refute what these witnesses said, and further to explain many of the transactions involved and sustain his good faith reliance upon those who prepared the questioned returns. But viewing the record as a whole, we must conclude that the evidence adduced by both sides presented questions of fact including the guilt or innocence of the defendant. The trial court correctly overruled the defendant's motion for judgment of acquittal and left the determination of those facts to the jury.[7]

Error is urged because of the use of summaries by the government, at the conclusion of its evidence, to present to the jury its interpretation of the evidence. These summaries, government's exhibits 108 through 114, were admitted by the court, without objection by the defendant's counsel as to their use, but without admitting their correctness and after a thorough cross-examination thereon. Upon admission of these exhibits, the trial judge carefully advised the jury concerning the purpose of such admission, and

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[7] Mighell v. United States, 10 Cir., 233 F. 2d 731, cert. denied, 352 U.S. 832; Hayes v. United States, 10 Cir., 227 F. 2d 540; Burke v. United States, 1 Cir., 293 F. 2d 398, cert. denied, 368 U.S. 903.

again, by a separate instruction at the conclusion of the case, correctly instructed concerning their nature and use.[8] The use of summaries in cases involving complicated documentary proof has been approved in numerous cases by this court,[9] as well as other appellate courts.[10] Their use in this case was appropriate.

Appellant points error in the acceptance by the court of a juror named Lewis, and the court's refusal, after trial, to conduct a proceeding concerning this juror's qualifications and for the correction of the reporter's record concerning the voir dire examination of this juror. Little need be said on this point. The trial judge, on the voir dire examination, read to the prospective jurors the names of the witnesses both sides expected to use in the trial, and inquired whether any of them were acquainted with any of the probable witnesses. Lewis requested additional information about a witness named Brakhage and then stated he was casually acquainted with him. After trial, an affidavit was procured from Lewis about the matter, and filed. The affidavit is not inconsistent with what Lewis told the trial judge upon the

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[8] "There have been admitted in evidence certain exhibits variously referred to as schedules or summaries. Strictly speaking these exhibits are not actual evidence, but they were admitted as summaries of other evidence in the case and they were admitted only for your assistance and convenience in considering the other evidence which they purported to summarize. Exhibits of this nature are permitted where they are based upon voluminous books, records, or documents already in evidence, in order to assist you in determining the ultimate facts or results shown by such books, records or documents. But you are reminded that it is the books, records, and documents, which are the evidence, and the summaries are admitted only to assist you in considering that evidence. For that purpose, you are entitled to consider them."

[9] Greer v. United States, 10 Cir., 227 F. 2d 546; Deschenes v. United States, 10 Cir., 224 F. 2d 688; Graves v. United States, 10 Cir., 191 F. 2d 579; Carlson v. United States, 10 Cir., 187 F. 2d 366, cert. denied, 341 U.S. 940.

[10] United States v. Kelley, 2 Cir., 105 F. 2d 912, 918; Turner v. United States, 4 Cir., 222 F. 2d 926, 933, cert. denied, 350 U.S. 831.

voir dire examination and contains nothing to justify the court in holding a hearing as requested. Furthermore, while Brakhage was listed as a proposed witness for the defendant, he did not appear in the trial.

Counsel for appellant seeks to apply the so-called "lead rule" to this case.[11] He cites no authorities in support of this contention. Our own research on this point shows such rule to have been applied only in "net worth" cases and never in a "specific item" case. The reasons for its application in a "net worth" case certainly are not present in a "specific item" case.[12] The contention must be rejected.[13]

Swallow also raises the question of possible jury prejudice because of a newspaper article appearing in the Denver Post during the trial. One of the government witnesses, who had denied, at his first appearance as a witness, that the defendant had talked with him about his testimony, later took the stand again and changed his testimony in this regard. Upon his recall, he stated Swallow had come to his hotel room and stated, "I got a proposition for you, if you go along with this, make things pretty easy for you. Might get some of your money back." The witness further testified, "Well, anyway he wanted me to testify in their favor" and then he said, "We will make it right with me." The questioned news item reported this as an apparent bribery attempt. Counsel for appellant raised no question about the article until upon his Motion For New Trial. The trial judge completely answered this contention upon his denial of a

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[11] Holland v. United States, 10 Cir., 209 F. 2d 516, aff'd, 348 U.S. 121.

[12] These reasons are well set forth in Holland v. United States, 348 U.S. 121.

[13] In Zacher v. United States, 8 Cir., 227 F. 2d 219, cert. denied, 350 U.S. 993, the court refused to apply the "lead rule" in an analogous case involving a prosecution on the theory of specific overstatements of deductions particularly where an extensive investigation of the taxpayer's affairs was made.

new trial.[14] We are in agreement with the trial judge's statement and must reject appellant's claim of prejudice on this point.

Swallow makes several other contentions here, some of which overlap the points we have covered and the others are so lacking in merit to not warrant discussion. Therefore, we conclude from our careful examination of the record before us that appellant received a fair trial at the hands of the court and jury and nothing of a prejudicial nature appears in the record.

The judgment of conviction is AFFIRMED.

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[14] "As to the newspaper article, the Court is satisfied that even if the articles were read by one or more of the jurors, that would not result in any prejudice to the defendant, because this matter which was quoted in the newspaper article—'Apparent Bribery Attempt'—was in essence the testimony of one of the witnesses in the case. In other words, the matter which lead to the article was explored in this court. My recollection is that both the defendant as well as, I believe, the witness Swift, was testifying as to what took place. However, in addition to that, this Court does not take the position that jurors violate the instructions of the Court—and this Court very carefully, and I believe the record will show, if not at every recess, certainly at most recesses, this Court specifically instructed the jury that they were not to read or listen to or view any news reports should there be any such concerning this case—the Court cannot presume that the jurors violated this instruction."

APPENDIX "B"

Judgment

Third Day, July Term, Wednesday, July 11th, 1962.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Jean S. Breitenstein and Honorable Delmas C. Hill, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that C. George Swallow, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgement and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

APPENDIX "C"

Order denying petition for rehearing

Twenty-Ninth Day, July Term, Tuesday, August 28th, 1962.

Order denying petition for rehearing Twenty-Ninth Day, Tuesday, August 28th, 1962.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Jean S. Breitenstein and Honorable Delmas C. Hill, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.